United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 946

Case No. 1040: HAZOU

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas at the request of Tuma Hazou, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 August and 30 September 1998 the time limit for the filing of an application with the Tribunal;

Whereas, on 14 September 1998, the Applicant filed an application containing pleas which read as follows:

"**II. Pleas**

7. With respect to.... procedure, the Applicant respectfully requests the Tribunal:

...

(c) *To decide* to hold oral proceedings on the present application in accordance with article 8 of its Statute and Chapter IV of its Rules;

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *To find and rule* that the Joint Appeals Board erred as a matter of law and equity in failing to make a finding of prejudice in the Applicant's case taking into consideration all the evidence before it;

(b) *To find and rule* that the compensation awarded by the Respondent for the procedural irregularities in his case was inadequate in view of the seriousness of the wrongdoing and damage to the Applicant's legitimate career expectations;

(c) *To award* the Applicant full salary and allowances including pension entitlements equivalent to his reinstatement through 31 January 2000, the month in which the Applicant reaches normal retirement age;

(d) *To award* the Applicant additional appropriate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof, including evidence of discriminatory motivation and for the delays in payment of the compensation previously awarded;

(e) *To fix*, pursuant to article 9, paragraph 1 of the Statute and Rules, if applicable, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(f) *To award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 14 February 2000;

Whereas the Applicant filed written observations on 11 May 2000;

Whereas the Applicant submitted an additional document on 9 June 2000;

Whereas, on 19 July 2000, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 1 May 1990, as Chief, External Relations at the P-5, step-VI level, in the Middle East and North Africa (MENA) Section, Amman, Jordan, on a two-year fixed-term contract. His appointment was renewed for a two-

year period, until 30 April 1994. His appointment was extended several more times, the last one expiring on 31 October 1996.

On 28 January 1994, a UNICEF Personnel Officer in New York sent a telex to the Regional Director, MENA, which stated that, since the Applicant would have served four years on fixed term appointments by 30 April 1994, "he [would] be eligible for review by the APC [Appointment and Promotion Committee] for conversion to a permanent appointment effective 1 May 1994". The Personnel Officer requested that the Regional Director submit her recommendation in that regard, together with the Applicant's 1993 performance evaluation report (PER) by the end of February 1994.

On 28 April 1994, the Regional Director sent a memorandum to the UNICEF Personnel Officer, recommending that the Applicant's contract be extended for one year "to enable sufficient time for a determination of options ... and to allow for improvements in performance ..."

On 5 January 1995, the UNICEF Personnel Officer informed the Applicant that his fixed-term appointment was being extended administratively until 30 April 1995. She notified the Applicant that submission of his case to the APC was delayed pending finalization of his 1993 PER which was received only on 27 October 1994. She further informed him that the Regional Director was now being requested to submit her recommendation for the Applicant's conversion to a permanent appointment "effective 1 May 1995".

On 23 February 1995, the Applicant wrote to the Regional Director, regarding the delay in presentation of his case to the APC. He stated that he had been working without a contract for more than 10 months, which was "demoralizing and un-settling", and that he was unwilling to sign a contract "which [was] almost a year overdue". He requested that she recommend him for permanent employment.

On 16 March 1995, the Applicant sent a memorandum to a UNICEF Personnel Officer, informing her that he had completed and handed in for dispatch Part 6 of his PER for the period 1 November 1993-9 March 1995, which had been sent to her by his supervisor incomplete and without having been discussed with him. On the same date, Part 6 of the Applicant's PER was sent to the UNICEF Personnel Officer. In Part 5 of the PER, the Regional Director, as the First Reporting Officer, commented that he was able to do well tasks he had done previously but

found it difficult to move into new areas and that he needed to take more initiative, be more creative and take a leadership role in the office. The Second Reporting Officer noted in Part 7 that he did not know the Applicant well enough to make an assessment, but recommended that the Applicant " be given another chance under close direct supervision ..."

On 16 May 1995, the Applicant wrote to Ms. Karin Sham Poo, Deputy Executive Director, UNICEF, submitting a rebuttal of the PER. He stated, *inter alia*, that his Supervisor had gone out of her way "to undermine [his] character and professional competence". On 22 June 1995, the Regional Director submitted her comments in reply to the rebuttal to the UNICEF Personnel Officer. She was "shocked and appalled" that the Applicant had made a "personal attack" which was "defamatory, insulting and contain[ed] falsehoods". According to the Regional Director, the PER was prepared with no prejudice, based solely on performance and keeping in mind the interests of the Organization and "... with much thought and after in-depth study of previous PERs". On 3 July 1995, the Applicant wrote again to Ms. Sham Poo, Deputy Executive Director, refuting the comments submitted by the Regional Director.

On 2 August 1995, the APC recommended conversion of the Applicant's contract to permanent status contrary to the recommendations of the MENA Regional Office. On 13 December 1995, the APC met again, reconsidered the case and recommended that the Applicant's contract not be renewed beyond 31 October 1996.

On 7 March 1996, the Applicant wrote to the Executive Director, UNICEF, bringing his case to her attention. Stating that he had been informed only one week earlier of her decision to accept the APC's recommendation not to renew his fixed-term contract, he insisted that his case was one of "gross mismanagement", a violation of due process and a serious infringement of his rights. He requested the Executive Director to review the matter.

On 15 March 1996, the Officer-in-Charge, Division of Human Resources, UNICEF, advised the Applicant of the APC's recommendation that his contract not be renewed beyond 31 October 1996, and that the recommendation had been accepted by the Executive Director. She also advised him that he would be placed on special leave with full pay for the remainder of his contract.

On 11 April 1996, the Ombudsperson for the MENA region contacted the Executive Director, UNICEF, and appealed to her to review the Applicant's case.

On 16 May 1996, the Applicant wrote to the Secretary-General, requesting review of the decision not to grant him a permanent appointment or renew his contract.

On 20 May 1996, the UNICEF Ombudsperson for the MENA Regional Office, wrote to the Regional Director, MENA. He concluded that there were "reasons to suspect non-observance of due process" in the Applicant's case and recommended that it should be reviewed.

On 24 June 1996, the Applicant requested that the Joint Appeals Board (JAB) recommend suspension of action on the contested decision.

On 23 September 1996, Ms. Sham Poo responded to the Applicant's request for review, confirming that the decision stood. On the same date, the Applicant lodged an appeal with the JAB.

On 14 October 1996, the JAB issued its report on the Applicant's request for suspension of action. It unanimously recommended that the request be granted.

The Under-Secretary-General for Administration and Management informed the Applicant on 28 October 1996, that the Secretary-General was not in agreement with the JAB and had decided not to grant the Applicant's request for suspension of action.

The Applicant separated from service on 31 October 1996, upon the expiration of his contract.

On 25 November 1997, the JAB submitted its report on the Applicant's appeal against the decision not to grant him a permanent appointment or to renew his fixed-term contract. Its considerations, conclusions and recommendation read, in part, as follows:

"*Considerations*

...

18. The Panel was aware that, in accordance with the applicable Tribunal judgements, the burden of proof in an accusation of prejudice lies on the Appellant. It noted a number of indications that prejudice did exist:

- The doubts expressed in the APC meeting of 2 August 1995 'as to the objectivity of the Regional Office ...'

- The dilatory fashion with which [the Regional Director] dealt with [the] Appellant's performance assessments, despite pointed reminders from

Headquarters, and her decision to send her assessment of March 1995 to Headquarters without giving Appellant the opportunity to see or rebut it.

- The report of the Regional Ombudsman and the Administration's failure to act on them.

- The knowledge of senior management in the Regional Office that staffing problems existed in the Information Office before [the] Appellant's recruitment, a situation which apparently played no part in [the Regional Director's] evaluation of Appellant's supervisory skills.

19. The Panel felt however, that it need come to no conclusion with respect tot he accusation of prejudice, because the decision of UNICEF with regard to Appellant's appointment was so tainted with procedural defects and irregularities that the Panel could base its conclusions and recommendations on those factors alone.

20. The Panel noted that the choice given to the APC … i.e. … either conversion to permanent appointment or non-renewal, was strictly in conformity with the terms of [administrative instruction] CF/AI/1990-10 of 13 December 1991 (…). Having expressed its doubts as to the objectivity of the Regional Officer, the APC recommended that Appellant be granted a permanent appointment, but the Deputy Executive Director (acting for the Executive Director) decided instead to extend his fixed-term appointment. The Panel noted that the Administrative Instruction makes provision for no such procedure, nor for extensions of fixed-term appointments to six years – or six and half as in the case of Appellant. Nor did Respondent put forth a satisfactory explanation for these departures from accepted procedure.

…

Conclusion and Recommendation

23. The Panel concludes therefore, that Appellant was denied fair consideration for conversion of his fixed-term appointment to permanent, and that his separation from service on 31 October 1996 resulted from a denial of due process.

24. The Panel recommends that Appellant be paid full salary and allowances and granted all entitlements – included, as appropriate, pension entitlements – to which he would have been entitled had he served until the age of retirement.

25. The Panel makes no further recommendation with respect to this appeal."

On 4 March 1998 the JAB amended its recommendation in paragraph 24 of its report. The new paragraph now stated:

"24. The Panel recommends that the Appellant be paid full salary and allowances and granted all entitlements – including, as appropriate, pension entitlements - to which he would have been entitled had he served until the end of the month in which [he would have] reached the age of sixty."

On 10 March 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General has ... taken note of the Panel's conclusion that you were denied fair consideration for conversion of your fixed-term appointment to permanent, and that your separation from service on 31 October 1996 resulted from a denial of due process. In the light of the procedural irregularities, the Secretary-General has decided to accept the recommendation of the Panel regarding compensation, and, accordingly, had decided that you be paid full salary and allowances and granted all entitlements – including, as appropriate, pension entitlements – to which you would have been entitled had you served until 31 January 1998, the end of the month in which you reached the age of sixty.

...:"

On 18 March 1998, the Applicant wrote to the Under-Secretary-General for Management and pointed out that according to the Staff Regulations and Rules as well as the UNICEF Human Resources Manual, his retirement age was not 60 but 62, since he was hired after 1 January 1990. The Under-Secretary-General for Management responded on 30 March 1998 that "it was clear to the [JAB] and to me that your retirement age would have been 62 if you had continued to work with UNICEF. The date of 31 January 1998 in my letter [of 10 March 1998] simply served as the point in time on the basis of which I decided, based on the recommendation of the [JAB] that your compensation should be calculated".

On 28 June 1999, the Secretary of the JAB wrote to the Office of Legal Affairs confirming that the JAB "did not reconsider the [Applicant's] case, nor did the second report it adopted 'differ' from the first. When the Legal Adviser in [the Under-Secretary-General for Management's] Office asked for a clarification of the Panel's first report, the Secretary recognized that the recommendation as worded did not accurately reflect the discussion and

conclusion of the Panel. After consulting the Panel members, a second report was prepared to make clear that 'the date of retirement' to which it referred was the end of the month during which the Appellant reached the age of 60."

On 14 September 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Owing to the egregious nature of the treatment he has been afforded, the only appropriate remedy is to place him in the position he would have been entitled to had it not been for the conduct complained of. This would of necessity entail compensation through his anticipated date of retirement at the age of 62.

2. The subsequent dilution of the JAB recommendation was precipitated by cost saving considerations which are totally inappropriate and contrary to the notions of fairness and justice. The compensation which has been awarded is inadequate for the harm done to the Applicant's career and to his family.

Whereas the Respondent's principal contentions are:

1. The award to the Applicant of full salary, allowances and pension entitlements, to which he would have been entitled until the age of sixty, constitutes adequate compensation for the harm he suffered.

2. The decision by the JAB to replace its recommendation of 25 November 1997 with its recommendation of 4 March 1998 was not arbitrary or punitive and did not constitute a procedural irregularity.

The Tribunal having deliberated from 10 to 28 July 2000, now pronounces the following judgement:

I. The Applicant appeals the Respondent's decision of 10 March 1998, in which the Secretary-General accepted the JAB's recommendation to pay the Applicant "full salary and

allowances" and grant him "all entitlements ... to which [he] would have been entitled had [he] served until 31 January 1998, the end of the month in which [he] reached the age of sixty". The Applicant's underlying claims are that the denial of a permanent appointment resulted from procedural irregularities and discriminatory motivation. He further claims that the JAB erred as a matter of law and equity in failing to make a finding of prejudice in his case. He seeks a remedy of compensation for consequential damages over and above the compensation he was awarded earlier by the Secretary-General on 10 March 1998. He was awarded full salary, allowances as well as pension entitlements on the basis that he hypothetically had been in service until the age of 60.

II. The facts of the case are essentially as follows:

On 1 May 1990, after being internationally recruited by UNICEF, the Applicant was awarded a two year fixed-term appointment at the P-5 level, as Chief, External Relations Officer, in Amman, Jordan. This appointment was then extended for two years to 30 April 1994, for a total of four years in service. During his fourth year of service, in 1994, the Applicant became eligible for conversion to permanent status. The APC recommended that the Applicant's appointment be converted to permanent. However, the Regional Director, MENA, after a series of delays, recommended only a one year extension of his fixed-term appointment. The APC reconsidered the case and recommended instead that the Applicant's contract not be renewed beyond 31 October 1996.

III. The Applicant contends that he should have been awarded permanent status. He argues that while it is within the discretion of the Secretary-General to grant or deny permanent status, the exercise of that discretion may not be tainted by procedural irregularities or discrimination. The Tribunal has consistently upheld the right of staff members to receive fair and objective review. (Cf. Judgements No. 412, *Gross* (1988); No. 495, *Castellanos* (1990) and No. 507, *Fayache* (1991)).

The JAB found that the procedures followed by the Organization were tainted with procedural defects and irregularities and that the Applicant did not receive fair consideration. Despite a series of administrative delays, his appointment was extended so that he had ultimately

served more than six years on fixed-term appointment. The Applicant was eligible for APC review for conversion to permanent appointment after four years of service. It was in this review-for-conversion process that the Applicant alleges that procedural irregularity and discrimination occurred in which he was denied a fair and objective review. While the APC initially recommended a permanent appointment, he did not receive the appointment because of UNICEF's objections.

IV. The Tribunal agrees that the Applicant was denied fair consideration for conversion to a permanent appointment and that his separation from service on 31 October 1996 resulted from a denial of due process on both procedural and substantive grounds. The right to due process involves the right of the staff member to a timely and objective evaluation of his or her performance in regard to decisions affecting contractual status.

This Tribunal has held in Judgement No. 363, *de Franchis* (1986), paragraph VI, that:

> "... a fair and impartial assessment of performance must be considered an essential right of all staff members and ... consequently the Administration should not spare any means to secure unimpeachable reports. In that context, any steps of the Administration that could lead to an assessment of a staff member's performance that would be reasonably open to challenge may constitute a breach of the staff member's rights to have his performance assessed in an absolutely impartial way."

The Regional Director's assessment of the Applicant's performance and his recommendation with respect to the Applicant's contractual status lacked timeliness. Based on hearings, the JAB noted the "dilatory" fashion with which the Director dealt with the Applicant's PERs, and her "failure to act on the Ombudsman reports".

V. On the issue of prejudice, the JAB did not come to a conclusion with respect to the accusation of prejudice, because the decision of UNICEF with regard to the Applicant's appointment was so tainted with procedural defects and irregularities that the JAB could base its conclusions and recommendations on those factors alone.

The Applicant claims that the JAB erred as a matter of law and equity in failing to make a finding of prejudice in his case. The JAB consciously stopped short of looking into the

prejudice issue. This omission cannot be faulted, as a matter of law, particularly because the JAB found in favour of the Applicant. However, the Tribunal can examine the claim of prejudice on the basis of the evidence before it. The Applicant must provide evidence of prejudice and on the basis of the evidence before it, the Tribunal will determine whether there was prejudice (cf. Judgements No. 724, *Fussimanya-Reyna* (1995); No. 862, *Szekielda* (1997) and No. 897, *Jhuti* (1998)). The Tribunal concludes that the evidence on the record fails to prove that there was prejudice.

VI. The Applicant claims that in its first report dated 25 November 1997, the JAB recommended that, "the Appellant be paid full salary and allowances and granted all entitlements - included, as appropriate, pension entitlements - to which he would have been entitled had he served until the age of retirement". When approached by the Respondent, the JAB subsequently changed its report to specify age 60 as the Applicant's age of retirement. The Applicant argues that since his retirement age is 62, he is entitled to an award of full benefits until the age of 62.

The Applicant bases his argument on the Staff Regulations and Rules as well as on rules in the UNICEF's Human Resources Manual which stipulate that for those employees recruited on or before 1 January 1990, the age of retirement is sixty while for those recruited on or after 1 January 1990 the age of retirement is 62. UNICEF recruited the Applicant in May 1990. Accordingly, the Applicant's age of retirement is 62.

The record shows that, without notice to the Applicant, the Under-Secretary-General for Management approached the JAB asking for clarification of the term "retirement age" in the JAB's first report, indicating that the JAB could not recommend more than two year's salary. The Secretary-General believed that the recommendation as worded did not accurately reflect the discussion and conclusion of the JAB. After the Under-Secretary-General for Management consulted the JAB, a second report was prepared to make clear that "the age of retirement" to which it referred was at the end of the month during which the Applicant reached the age of 60 because they intended to award salary as if he had worked until the age of 60. The procedure followed by the Under-Secretary-General for Management lacked transparency, was irregular and amounted to an abuse of discretion. The JAB's report should not have been changed without

consulting the Applicant. Accordingly, the Tribunal decides that the Applicant should be additionally compensated, taking into account the compensation already paid by the Respondent.

VII. In view of the foregoing, the Tribunal:

(a) Awards the Applicant four months net base salary at the rate in effect at the time of his separation from service, in addition to the compensation he has already received;

(b) Rejects all other pleas.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary